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| T.B., Appellant |) | |
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| and |) | Docket No. 21-0448 |
| |) | Issued: September 27, 2021 |
| U.S. POSTAL SERVICE, FRANKLIN D. |) | |
| ROOSEVELT STATION POST OFFICE, |) | |
| New York, NY, Employer |) | |
| |) | |

Case Submitted on the Record

Before:
 JANICE B. ASKIN, Judge
 PATRICIA H. FITZGERALD, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

On February 4, 2021 appellant filed a timely appeal from a January 5, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,569.82 for the period October 28 through December 5, 2020 because she continued to receive wage-loss compensation following her return to work; and (2) whether OWCP properly

² The Board notes that, following the January 5, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 20, 2018 appellant, then a 26-year-old postal support employee sales and services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained an injury to the right side of her head when boxes toppled onto her while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for: cervical and lumbar sprain; right shoulder rotator cuff strain; head, right knee, and right hand contusions; post-concussion syndrome; and cervical disc displacement at the C4-5 level.³ It paid appellant wage-loss compensation on the supplemental rolls from May 5 through October 13, 2018 and on the periodic rolls from October 14, 2018 through December 5, 2020.

By letter dated December 3, 2018, OWCP explained how appellant's compensation rate was determined. It also informed appellant that, in order to minimize the possibility of an overpayment of compensation, she should notify OWCP immediately when she returned to work. OWCP again advised appellant to monitor her EFT payments carefully, at least every two weeks.

In a report of work status (Form CA-3) dated December 1, 2020, the employing establishment advised OWCP that appellant had returned to full-time work, without restrictions, on October 28, 2020. It requested that OWCP declare an overpayment of compensation.

In a compensation termination calculation worksheet, OWCP calculated appellant's overpayment of compensation for the period October 28 through December 5, 2020. It noted that for the period October 28 through November 7, 2020 appellant received a net overpayment of compensation of \$724.82 and for the period November 8 through December 5, 2020, she received a net overpayment of compensation of \$1,845.00. The EFT deposit covering the period October 28 through November 7, 2020 was made on November 7, 2020, while the EFT deposit covering the period November 8 through December 5, 2020 was made on December 5, 2020.

On December 4, 2020 OWCP advised appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$2,569.82 because she continued to receive compensation for total disability after she returned to work on October 28, 2020. It also made a preliminary finding that she was at fault in the creation of the overpayment because she had accepted payments that she knew or reasonably should have known were incorrect. OWCP explained that more than 30 days had elapsed since the EFT deposit was made, which allowed appellant ample time to receive and review a statement from her financial institution which showed the details of the improper payment. It requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. Additionally, OWCP informed appellant that

³ The initial acceptance letter of June 1, 2018 informed appellant that wage-loss compensation for total disability was available only if she was unable to perform the duties of her regular position and that she should notify OWCP if she returned to work or obtained new employment. OWCP also advised appellant that, if she received compensation payments by electronic funds transfer (EFT), she should monitor her EFT deposits carefully, at least every two weeks. It advised that if she worked during a period in which she received compensation, she should notify OWCP in order that the overpayment could be collected.

within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On December 14, 2020 appellant accepted a modified full-time assignment with the employing establishment as a sales and services distribution associate (SSDA).

On December 17, 2020 appellant informed OWCP that she was not working and that she had only attended training from October 28 through November 4, 2020. She stated that she had accepted a job offer and returned to work for one day on December 14, 2020, but did not return thereafter because she was in pain and felt that the position was outside her work restrictions. OWCP's representative advised appellant to provide a written response to the preliminary notice of overpayment.

On December 29, 2020 appellant informed OWCP that the employing establishment was not following her work restrictions and that her condition had worsened.

On January 5, 2021 OWCP received a letter from appellant responding to the preliminary notice of overpayment. Appellant advised that she attended training from October 28 to November 5, 2020. She noted that a check had been generated by the employing establishment after training; however, she never received it. Appellant also indicated that she had returned to work for one day on December 14, 2020, and had then worked from December 29, 2020 to January 2, 2021.

By decision dated January 5, 2021, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$2,569.82 for the period October 28 through December 5, 2020 because she continued to receive wage-loss compensation following her return to work. It noted appellant's telephone calls on December 17 and 29, 2020, but related that she was advised to submit a response to the preliminary determination in writing, but no written response was received. OWCP determined that she was at fault in the creation of the overpayment, as she accepted compensation payments which she knew or should have known were incorrect. It requested that appellant repay the \$2,569.82 overpayment in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116(a) of FECA provides that, while an employee is receiving compensation the employee may not receive salary, pay, or remuneration of any type from the United States, except

⁴ *Supra* note 1 at § 8102(a).

in limited specified instances.⁵ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

The record establishes that appellant returned to the employing establishment for training on October 28, 2020. In a letter received by OWCP on January 5, 2021, appellant indicated that this training was held from October 28 to November 5, 2020 and that she thereafter did not return to work until December 14, 2020. She noted that a check had been generated by the employing establishment after training; however, she never received it.

In the January 5, 2021 decision, OWCP finalized its preliminary overpayment determination. It, however, failed to review appellant's written statement that was received on January 5, 2021, the same date it finalized its overpayment determination. In the case of *William A. Couch*,⁷ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. OWCP's procedures provide that it is crucial that all relevant evidence received prior to the issuance of final decision is addressed, as the Board's decisions are final with regard to the subject matter appealed.⁸ This principle applies with regard to evidence received by OWCP the same day a final decision is issued.⁹ As OWCP did not address appellant's written response in its January 5, 2021 decision, the Board finds that this case is not in posture for decision.¹⁰

For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the January 5, 2021 decision. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁵ *Id.* at § 8116(a).

⁶ *C.C.*, Docket No. 19-1268 (issued April 2, 2021); *M.P.*, Docket No. 20-1035 (issued December 1, 2020); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

⁷ 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012). *See also C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch, id.*

⁹ *See S.S.*, Docket No. 19-1737 (issued April 7, 2020); *J.S.*, Docket No. 16-0505 (issued July 18, 2016); *Linda Johnson*, 45 ECAB 439 (1994) (evidence received the same day as the issuance of OWCP's decision must be reviewed).

¹⁰ *P.C.*, Docket No. 20-1216 (issued June 25, 2021); *see V.C.*, Docket No. 16-0694 (issued August 19, 2016).

CONCLUSION

The Board finds that the case is not in posture for decision.¹¹

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 27, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.